IN THE

SUPREME COURT OF THE UNITED STATES

79-69

October Term, 1979

COMMONWEALTH OF PENNSYLVANIA

v.

WILLIAM J. KELLY, *Appellant*

JURISDICTIONAL STATEMENT ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

COMMONWEALTH OF PENNSYLVANIA

v.

WILLIAM J. KELLY, *Appellant*

JURISDICTIONAL STATEMENT OF APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

Appellant appeals from the judgment of the Supreme Court of Pennsylvania entered on April 13, 1979, denying Appellant's Petition for Reargument and sustaining Appellant's conviction, and submits this statement to prove that the Supreme Court of the United States has jurisdiction of the Appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of Pennsylvania is reported at 399 A.2d 1061 (1979) while the official report of this opinion has not been reported. A copy of this opinion is attached hereto as Appendix "A". The opinion of the Superior Court of Pennsylvania is reported at 245 Pa. Super. 351, 369 A.2d 438 (1976). The opinion of the Court of Common Pleas of Philadelphia County is unreported and is attached hereto as Appendix "B".

JURISDICTION

1. This suit originated when Appellant was tried and convicted of violations of the Pennsylvania Crimes Code, 18 Pa.C.S.A. §5101 (obstructing the administration of law), 18 Pa.C.S.A. §4902 (perjury) and 18 Pa.C.S.A. §4701 (bribery).

2. The judgment of the Supreme Court of Pennsylvania was entered on March 14, 1979 and a Petition for Rehearing was denied to this Honorable Court in the Court of Common Pleas of Philadelphia County on May 23, 1979, a copy of which is attached hereto as Appendix "C".

3. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257 (2).

4. The Appellant filed the Notice of Appeal to this Honorable Court in the Court of Common Pleas of Philadelphia County, on May 23, 1979, a copy of which is attached hereto as Appendix "D".

STATUTE INVOLVED

The Courts of Pennsylvania have upheld the constitutionality of Section 10-110 of the Philadelphia Home Rule Charter, which reads as follows:

> If any officer or employee of the City shall willfully refuse or fail to appear before any court, or before the Council, or any committee thereof, or before any officer, department, board, commission or body authorized to conduct any hearing or inquiry, or having appeared, shall refuse to testify or to answer any question relating to the affairs or government of the City or the conduct of any City officer or employee on the ground that his testimony or answers would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any matter about which he may be asked to testify before such court or at any such hearing or inquiry, he shall forfeit his office or position, and shall not be eligible thereafter for employment to any position in the City service.

QUESTIONS PRESENTED

Whether Section 10-110 of The Philadelphia Home Rule Charter, which declares that an employee of the City of Philadelphia who asserts his privilege against self-incrimination or refuses to waive his right to immunity shall forfeit his right to employment by the City, is so coercive as to violate the provisions of the Fourteenth and Fifth Amendments of the Untied States Constitution and render any testimony given pursuant to its provisions as being unconstitutionally coerced and inadmissible as evidence in a criminal trial of the employee.

STATEMENT OF CASE

Under Section 10-110 of The Philadelphia Home Rule Charter, the Appellant, a Philadelphia police officer, was forced to choose between his Fifth Amendment rights and his job when he was called before the Investigating Grand Jury on December 18, 1974. At that time, he was sworn in and warned that if he were a city employee and he chose to claim a constitutional privilege, then further instructions based on Section 10-110 of The Philadelphia Home Rule Charter would be necessary. The Appellant did not request any further instructions and, on December 20, 1974, he testified before the Investigating Grand Jury which was investigating corruption in the Philadelphia Police Department. He answered a series of questions concerning his duties as a policeman but did assert his privilege against self-incrimination in answer to two of the many questions asked him.

Appellant raised the issue of the admissibility of his Grand Jury testimony in his Motion to Suppress before trial and during his trial. See, Notes of Testimony, page 222. In both his appeals to the Superior and Supreme Courts of Pennsylvania, Appellant raised the issue of the unconstitutionality of Section 10-110 of the Philadelphia Home Rule Charter.

The Appellant was found guilty by a jury of obstruction of the administration of law, perjury and bribery. At his trial, the Notes of Testimony of his Grand Jury appearance were admitted into evidence and read to the jury. This testimony formed the basis of the Appellant's conviction for perjury and, also, helped establish the Commonwealth's case concerning the other substantive crimes. See, Notes of Testimony, pages 240 and 245.

Concerning the Appellant's objection to the admission of this testimony, the trial judge, the Honorable Stanley L. Kubacki, in an opinion dated March 18, 1976, concluded as follows:

> The defendant contends further that it was improper to admit his grand jury testimony. upon which two counts of perjury were based, since it was allegedly given involuntarily under the coercion of City "Charter" warnings, when the defendant was warned of his rights prior to his grand jury appearance. The supervising judge expressly advised him that he was not compelled to testify under the appropriate "Charter" provisions but, rather, that he had a right to remain silent. Thus, this contention has no factual basis. (Appendix "B").

The Superior Court of Pennsylvania, in an opinion by the Honorable T. Jacobs, dated November 22, 1976, rejected the trial court's reasoning while accepting its conclusion. It held that the Appellant's Grand Jury testimony was not coerced, "[I]nasmuch as the Charter warnings were never given.'" 245 Pa. Super. at 362, 369 A.2d at 443. Furthermore, it held that since the Appellant did assert his privilege against self-incrimination to two of the many questions he was asked before the Grand Jury, he waived his right to claim that his testimony was coerced.

Thus, the Superior Court held that a city employee who is testifying under a forfeiture statute similar in effect to that which this Court has repeatedly struck down since *Garrity v. New Jersey*, 385 U.S. 493 (1967) can have his coerced testimony used against him in a criminal trial if the actual words of the forfeiture statute are not read to him prior to his testifying.

The Supreme Court of Pennsylvania affirmed the Superior Court on this issue without further comment.

PRESENTATION OF A SUBSTANTIAL FEDERAL QUESTION

1. Jurisdiction Under 28 U.S.C. §1257 (2)

The Supreme Court of Pennsylvania, the highest court of that Commonwealth, affirmed the decision of the Superior Court of Pennsylvania which, in turn, had affirmed the trial court's refusal to grant the Appellant's Post-Trial Motions for a new trial. On April 13, 1979, the Supreme Court of Pennsylvania denied Appellant's Petition for Reargument, thus making their affirmance a final judgment. *Market St. Reg. Co. v. Railroad Commission of State of California*, 324 U.S. 548, *rehearing denied*, 324 U.S. 890 (1945).

The Appellant raised his Federal constitutional question before, during and immediately following his trial. On each occasion, the trail court held that the statute in question was not so coercive as to render any testimony given by a city employee to be constitutionally defective. The Superior Court affirmed this judgment for the reason that the specific statutory prohibition against a city employee's claiming a privilege against self-incrimination was not read to the Appellant before he testified. Throughout these proceedings, the Appellant has argued that the statute, itself, is constitutionally infirm, regardless of whether it was read to the Appellant before he testified, since the Appellant was aware of the provisions of the statute and decided to testify solely to retain his job.

The statute had a direct bearing on the conviction of the Appellant, since it was the statute which forced the Appellant to testify before the Grand Jury and it was this Grand Jury testimony which was used to convict the Appellant. *Garrity v. New Jersey, supra.* The Superior Court of Pennsylvania refused to hold that the statute was unconstitutional, and the Supreme Court of Pennsylvania affirmed this holding without comment.

Thus, the highest court of the Commonwealth of Pennsylvania has declared a state law to be valid as against an attack on its constitutionality. However, if this Honorable Court does not consider an appeal to be the proper procedure for review, then Appellant requests that the papers and proceedings herein be recorded and acted upon as a Petition for Certiorari under Title 28 of the United States Code, Section 2103.

2. The Federal Questions Presented are Substantial

The Supreme Court of Pennsylvania refused to grant Police Officer Kelly's appeal because the actual words of Section 10-110 of The Philadelphia Home Rule Charter were not read to him before he testified to the Grand Jury. Even though every city employee is on constructive notice of the warnings contained in The Home Rule Charter, and even though Police Officer Kelly was aware of the specific warnings contained in The Home Rule Charter, the Court held that the "magic" words of The Home Rule Charter warnings must be read to a city employee in order for his testimony to be held to be coerced.

Reference was made to The Home Rule Charter warnings by the judge who administered the oath to the Appellant at the Grand Jury. Therefore, the Appellant was on notice that the forfeitures stated in The Home Rule Charter were applicable to his testimony before the Grand Jury. Yet, the Pennsylvania courts have decided that actual or constructive notice of The Home Rule Charter warnings was not controlling; the actual reading of the warnings was necessary to claim that testimony given pursuant to such warnings was coerced. By this formalistic approach to constitutional rights, the Pennsylvania courts have attempted to give new life to a law long held to be unconstitutional by this Court.

The decisions of the Pennsylvania courts in upholding the constitutionality of this forfeiture statute are in direct conflict with the decisions of this Honorable Court. *Garrity*

v. New Jersey, supra; Gardner v. Broderick, 392 U.S. 273 (1968); *Lefkowitz v. Turley,* 414 U.S. 70 (1973); *Lefkowitz v. Cunningham,* 431 U.S. 801 (1977).

William Kelly, the Appellant, was a Philadelphia Police Officer. As such, he was subject to dismissal from the Police Department if he refused to testify before the Investigating Grand Jury. He was a target of that Grand Jury and was eventually indicted by them. The Appellant knew of Section 10-110 of The Philadelphia Home Rule Charter and, also, knew he would be fired if he did not testify. There were no provisions in that law for immunized testimony, either use or transactional. Without being given such immunity, Officer Kelly's rights under the Fourteenth and Fifth Amendments were trampled upon.

This Court in *Lefkowitz v. Cunningham, supra,* laid to rest all doubts concerning the constitutionality of forfeiture statutes, such as the one in the present case. After analyzing *Garrity* and its progeny, the Court forcefully concluded:

> These cases settle that government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized. *Lefkowitz v. Cunningham, supra,* at 806.

As a Grand Jury witness, the Appellant was protected by the Fifth Amendment from being forced to give testimony which could later be used to convict him. *United States v. Washington,* 431 U.S. 181 (1977). The testimony given by the Appellant to the Grand Jury was coerced in that it was given under the forfeiture statute, but without any protection against its later use against the Appellant. Thus, the prosecutor in this case forced the Appellant to give testimony against himself by calling him as a witness before the Grand Jury, in that the prosecutor knew that the Appellant was a target of the Grand Jury, yet he also knew that Appellant was forced to testify or lose his job. See,

United States v. Doss, 563 F.2d 265 (6th Cir. 1977). Even if the Appellant sought immunity, he would be dismissed from his job. Such economic compulsion has rendered similar statutes invalid under this Court's past decisions. *Uniformed Sanitation Men Ass'n., Inc. v. Commissioner of Sanitation,* 392 U.S. 280 (1968).

The Pennsylvania courts have attempted to avoid the past holdings of this Court by declaring that such forfeiture statutes render testimony given under them to be invalid only if the statute is actually read to the employee before he testifies or only if he never asserts his privilege against self-incrimination during his testimony. Neither of the above-stated holdings is consistent with either the spirit or the word of *Lefkowitz v. Cunningham, supra.* In that case, the Court clearly held that in order for a state to compel its employees to testify, it must offer them the protection, at least, of use immunity.

In recognizing the effect of *Garrity v. New Jersey, supra,* and its progeny on its own forfeiture statute, the State of New Jersey has repealed its offensive forfeiture statute and replaced it with a use immunity law for all employees who are compelled to testify. N.J.S.A. 2A:81—17.2a1 and 2A:81—17.2a2. Its courts have held that such immunity must leave an employee in the same position as if he had asserted the privilege against self-incrimination. *State v. Portash,* 151 N.J. Super. 200, 376 A.2d 950 (1977).

The decision of the Pennsylvania courts in this case has left the law in Pennsylvania concerning its forfeiture statute in a state of disarray. See *DiCiacco v. Civil Service Commission of Philadelphia,* —— *Pa. Cmwlth.* ——, 339 A.2d 703 (1978) and *Strauss v. Civil Service Commission of Philadelphia,* —— *Pa. Cmwlth.* ——, 398 A.2d 1064 (1979). The ill-effects of Pennsylvania's attempt to circumvent the holdings of this Court may be to render invalid any prosecution involving a city employee who has been forced to give a statement under this forfeiture statute. The Philadelphia Police Department routinely takes such

coerced statements from police personnel and uses such statements against those personnel in disciplinary proceedings and in criminal prosecutions. *Commonwealth v. Triplett*, 462 Pa. 244, 341 A.2d 62 (1975).

Finally, while not relying on *United States v. Mandujano*, 425 U.S. 564 (1976), the Superior Court of Pennsylvania did cite that opinion as possibly controlling in this case, even if the Appellant's testimony were suppressed. *Commonwealth v. Kelly*, 245 Pa. Super. at 362, 369 A.2d at 444. There is no justification for this position. This Court in *Mandujano* specifically held that false statements made to a grand jury were not suppressable in a prosecution for perjury based on those statements, even though *Miranda* warnings were not given to the grand jury witness. The plurality opinion based its holding on the fact that the purpose of the warnings mandated by *Miranda v. Arizona*, 384 U.S. 436 (1966) would not be served by requiring them before a Grand Jury. The coercive atmosphere of custodial police interrogation is not present in the Grand Jury room. *United States v. Mandujano, supra*, at 580; *United States v. Dipp*, 581 F.2d 1323, 1327 (9th Cir. 1978).

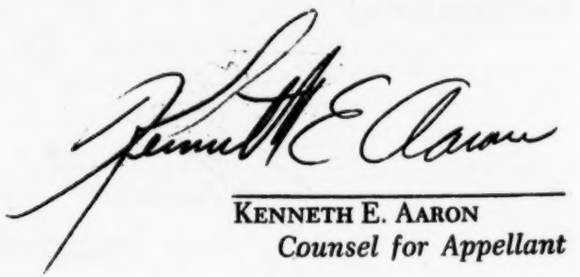
In the present case, the compulsion is inherent in the statute which compels a city employee to testify without granting him immunity. *Garrity* and its progeny are not based on any hope to deter prohibited police activity as was *Miranda*, but, rather, more on the nature of psychological compulsion as was found in *Chambers v. Florida*, 309 U.S. 227 (1940).

Furthermore, the Appellant's grand jury testimony was used against him at trial to prove the non-perjury offenses; such a use may not be harmonized with the Appellant's Fifth Amendment rights. *United States v. Apfelbaum*, 584 F.2d 1264, 1271 (3rd Cir. 1978).

In conclusion, the decision of this Court in *Lefkowitz v. Cunningham, supra*, is controlling over the issues presented by this appeal and this Court should allow this appeal in order to protect and enforce its past holdings in

Garrity and its progeny. Without such a review, Pennsylvania will have been able to avoid the effects of *Garrity* and its progeny and will have provided a sinister precedent to other states who seek to dampen the rights of their employees by economically coercing them to forfeit their constitutional rights.

Respectfully submitted,

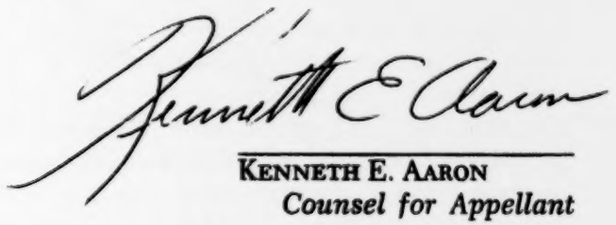


KENNETH E. AARON
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of July, 1979, three (3) true and correct copies of Appellant's Jurisdictional Statement were personally served on Robert B. Lawler, Assistant District Attorney, 2300 Centre Square West, Philadelphia, Pennsylvania 19102.

I further certify that all parties required to be served have been served.



KENNETH E. AARON
Counsel for Appellant

Appendix "A"

IN THE
SUPREME COURT OF PENNSYLVANIA
Eastern District

	: No. 417 January Term, 1977
COMMONWEALTH OF PENNSYLVANIA	: Appeal from the Judgment of the Superior Court filed November 22, 1976 at No. 1074 October Term, 1976, Affirming the Orders of Judgments of Sentence of the Court of Common Pleas, Trial Division, Criminal Section, Philadelphia, at Nos. 2381 to 2385 March Term, 1975.
vs.	
WILLIAM J. KELLY, *Appellant*	

OPINION OF THE COURT

ROBERTS, J.: Filed March 14, 1979

In August 1975, appellant was convicted by a jury of one count of obstructing the administration of the law, 18 Pa. C.S.A. § 5101, three counts of perjury, 18 Pa. C.S.A. § 4902, and one count of bribery, 18 Pa. C.S.A. § 4701. Post-trial motions were denied and appellant was sentenced to three to twenty months in prison on the three perjury counts. Sentence was suspended on all other counts. On appeal the Superior Court affirmed. 245 Pa. Super. 351, 369 A.2d 438 (1976). After review of the record and consideration of appellant's contentions we find no basis for disturbing the order of the Superior Court and we affirm.*

* Appellant has argued that (1) he was entitled to complete transcripts of the grand jury testimony of prosecution witnesses and that the trial court erred in deleting those portions which it

Only one issue merits comment. The trial court in this case placed notations on the verdict slip seeking to identify for the jury the separate counts charged. We are satisfied that sending out with the jury a verdict slip with identifying notations is not prohibited by Rule 1114, Pa. R. Crim. P. Here, where there were numerous separate and distinct charges against appellant, we find no abuse of the trial court's discretion in concluding that there was a need for the identifying notations. The notations themselves, while not ideally drawn, were nevertheless in essence neutral and viewed in the context of the court's instructions not suggestive or prejudicial.

Unlike *Commonwealth v. Baker*, 466 Pa. 382, 353 A.2d 406 (1976), the language on the verdict slip here is not a condensed and potentially misleading statement of the court's instructions. On its face the verdict slip left to the jury the decision whether defendant was guilty or not guilty. That the notations referred incidentally to some aspect of the Commonwealth's evidence does not in and of itself require reversal in the circumstances of this case.

Nonetheless, it is not inappropriate to observe as a general prudential principle that identifying notations which are not completely neutral create a potential for prejudice. It is therefore desirable for trial courts in the exercise of their discretion: (1) to determine after consultation with counsel whether, due to the complexity of the charges and the nature of the trial, there is a clear need for identifying notations on a verdict slip to avoid confusion by the jury concerning the issues before it; and (2) if such a clear need appears, to determine, after conferring with counsel, the text which bests preserves the impartiality of the verdict slip. We are satisfied that trial courts together with counsel can achieve that result.

The judgment of the Superior Court is affirmed.

Mr. Chief Justice EAGEN did not participate in the consideration or decision of this case.

Former Justice POMEROY did not participate in the decision of this case.

Mr. Justice MANDERINO filed a dissenting opinion.

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* [cont'd from previous page]

deemed not relevant to the charge against appellant; (2) hearsay statements of an unindicted co-conspirator should not have been admitted into evidence; (3) giving to the jury a verdict slip containing notations descriptive of each count was prejudicial error; (4) appellant's grand jury testimony was coerced and therefore should not have been admitted at trial; (5) appellant should have been charged under 18 Pa. C.S.A. § 5301 rather than 18 Pa. C.S.A. § 5101; (6) certain records were not properly qualified and hence should not have been admitted; (7) the trial judge's charge and his conduct during trial were prejudicial; and (8) the evidence against the appellant was insufficient.

[J-374]

IN THE
SUPREME COURT OF PENNSYLVANIA
Eastern District

COMMONWEALTH OF PENNSYLVANIA	: No. 417 January Term, 1977
vs.	: Appeal from the Judgment of
WILLIAM J. KELLY, *Appellant*	: the Superior Court filed November 22, 1976, Affirming the Orders of Judgment of Sentence of the Court of Common Pleas, Trial Div., Criminal Section, Philadelphia, at Nos. 2381 to 2385 March Term, 1975.

DISSENTING OPINION

MANDERINO, J. Filed March 14, 1979

I dissent. Rule 1114 of our Rules of Criminal Procedure specifies that "[u]pon retiring to deliberations, the jury shall not be permitted to have a transcript of any trial testimony, nor a copy of any written confession by the defendant, nor a copy of the information and indictment. Otherwise, upon retiring, the jury may take with it such *exhibits* as the trial judge deems proper." (emphasis added). Appellant argues here, as he did before the Superior Court, that the trial court erred in allowing the jury to take with it certain "verdict slips" on which the jury was to record its verdict as to each count against appellant, and on which a limited recitation of the facts forming the basis for each count was typed at the trial judge's direction. These "verdict slips" contained the following description of each count:

#2381 . . . Obstructing Administration of Law or Other Governmental Functions September 27, 1973
Arrest of Andy Marino (Sgt. Andrew Morrese) Chippy's Bar.

#2382. . . PERJURY:
FIRST COUNT:
Testimony of Defendant before Special Investigating Grand Jury on December 20, 1974 Regarding Truth of Statement in Oath Before Judge Melton to Secure Warrant:
SECOND COUNT:
Testimony of Defendant Before Special Investigating Grand Jury on December 20, 1974 Regarding Speaking to Narcise Prior to Raid on September 27, 1973.

#2383. . . PERJURY:
Oath of Defendant Before Judge Melton on September 27, 1973 that He Did conduct a Surveillance of Chippy's Bar on September 25, 1973 between the hours of 12:15 P.M. and 1:00 P.M.

#2384. . . BRIBERY IN OFFICIAL AND POLITICAL MATTERS:
FIRST COUNT:
Receipt of $20.00 from Narcise on or about July 30, 1973.
SECOND COUNT:
Receipt of $20.00 from Narcise on or about Sept. 7, 1973.
THIRD COUNT:
Receipt of $20.00 from Narcise on or about Sept. 18, 1973.
FOURTH COUNT:
Receipt of $50.00 from Narcise on or about Oct. 3, 1973.

The brief factual descriptions accompanying each count do not fall squarely within those items specifically prohibited by Rule 1114—namely, a transcript of trial testimony, a copy of a written confession or a copy of the information or indictment—nor are they "exhibits" such as may be permitted by the Rule. Nevertheless, the danger pre-

sented by allowing the jury to take those prohibited items with it during deliberations is equally present here. The prohibition "... are designed to ensure that the jury does not give undue weight to those written materials before them." Com. v. Bahe, —— Pa. ——, ——, 353 A.2d 406, 415 (1976) (dissenting opinion of Roberts, J.).

Mr. Justice Roberts words of dissent in *Comm. v. Bahe, supra,* are equally applicable here.

> "The court's procedure in this case could only encourage the jury to ignore the court's general instructions and to reach a verdict without a complete analysis of the issues involved.
>
> This could have created an impression with the jury that the court considered such definitions unimportant and is similar to an instruction to consider only part of the evidence. Moreover. the jury might have also structured its entire deliberation solely around answering these questions, thus short-circuiting full consideration of all the evidence and the general instructions. These dangers jeopardized defendant's right to a fair trial."

Id at ——, 353 A.2d at 416

Similarly, by including a brief description of some of the evidence associated with each count, the court in the instant case may have encouraged the jury to conclude that other evidence was considered unimportant by the court, and that the listed "facts" were the only ones that needed to be considered by the jury. Additionally, these cryptic summaries may have caused the jury to believe that the listed "facts" has been proven by the prosecution. "These dangers jeopardized [appellant's] right to a fair trial." Id at ——, 353 A.2d at 416. I therefore dissent.

Appendix "B"

Opinion of Stanley L. Kubacki Dated March 18, 1976

IN THE COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY
TRIAL DIVISION-CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	:	MARCH TERM, 1975
vs.	:	NO. 2381-2385
WILLIAM J. KELLY	:	

OPINION

BY: JUDGE STANLEY L. KUBACKI

DATE: MARCH 18, 1976

The defendant was found guilty by a jury on one count of obstruction of the administration of law, three counts of perjury and one count of bribery in official matters.

The defendant is an officer with the Philadelphia Police Department. On July 30, 1973, he accepted $20.00 from a gambler in a West Philadelphia tap-room in exchange for not taking action against the latter's gambling operation. This "payoff" was observed by a Pennsylvania State Policeman who was assigned as an undercover investigator with the Pennsylvania Crime Commission.

In September, 1973, the defendant and the gambler became suspicious of the true identity of a man who was acting as a gambler but who in reality was another Pennsylvania State Policeman also assigned to the Crime Commission. Consequently, the defendant perjured himself in an affidavit submitted to a judge on September 27, 1973, in order to secure a search warrant. The defendant intended to verify his suspicions by an arrest. The warrant was issued and executed. The arrest of the agent compelled him to abandon his undercover activities.

The defendant appeared before an investigating grand jury on December 20, 1974. At that time he reaffirmed the facts contained in his search warrant affidavit and testified further that he had not spoken or met the gambler prior to the execution of the search warrant. It was material to this investigation for the Grand Jury to ascertain whether this defendant has accepted payoffs while serving as a police officer and if he has improperly secured a search warrant which served to obstruct a lawful investigation by the Pennsylvania Crime Commission into allegations of police corruption in Pennsylvania. As a result of the defendant's Grand Jury testimony he was indicted on two counts of perjury.

At the trial the witnesses included the gambler, who testified pursuant to a grant of immunity, the two Crime Commission investigators and several other fact witnesses. Demurrers were sustained to four counts of theft by extortion based upon the same incidents upon which the bribery counts were based.

The defendant first alleges in support of his motion that the

> "denial . . . of complete and unedited transcripts of prior testimony of prosecution witnesses violated defendant's right to . . . [*inter alia*] cross-examine witnesses against him."

At trial, the Commonwealth provided defense counsel with transcripts of testimony of prior Grand Jury and Pennsylvania Crime Commission hearings of certain prosecution witnesses. Since these investigations were ongoing, the Commonwealth deleted from these transcripts portions of testimony which referred to investigations which were unrelated to this defendant. This Court examined these confidential records and permitted the defendant access to certain additional portions which were determined to be "relevant to matters raised in direct examination." *Commonwealth v. Swierczewski*, 215 Pa. Super. 130, 135, 257

A.2d 336, 339 (1969). Considering the broad latitude within which defense counsel was allowed to cross-examine prosecution witnesses, his right of cross-examination was clearly protected.

The defendant's argument that hearsay evidence was improperly admitted is similarly without merit. The Commonwealth established well beyond a fair preponderance of the evidence that a conspiracy existed, *Commonwealth v. Hirsch*, 225 Pa. Super. 494, 497, 311 A.2d 679, 681 (1973), and that the declarations at issue were made

> "in the furtherance of and during the continuance of the common purpose. . . ."

Commonwealth v. Ransom, 446 Pa. 457, 461, 288 A.2d 762, 764 (1972), quoting from *Commonwealth v. Holloway*, 429 Pa. 344, 346, 240 A.2d 532, 533-34 (1968) (*emphasis added in Ransom*). See also McCormick, *Evidence* §244 at 522 (1954). These statements clearly fell within the co-conspirator exception to the hearsay rule and were properly admitted.

The defendant also asserts that he was improperly charged with violating a general penal proviso where a more specific statute was available. The unlawful conduct of the defendant did constitute a violation of 18 P.S. §5301, Official Oppression. However, 18 P.S. §5101, Obstructing Administration of Law or Other Governmental Function, more fully covered the incident in question which went beyond a mere unlawful arrest into the obstruction of an on-going investigation of allegations of police corruption.

The defendant contends further that it was improper to admit his grand jury testimony, upon which two counts of perjury were based, since it was allegedly given involuntarily under the coercion of City "charter" warnings. When the defendant was warned of his rights prior to his grand jury appearance, the supervising judge expressly advised him that he was not compelled to testify under the appropriate "charter" provisions but, rather, that he had a right to remain silent. Thus, this contention has no factual basis.

Exhibits C-3, C-4 and C-5 were properly admitted, 28 P.S. §91b, and neither the charge to the jury nor the form of the jury instruction and verdict sheets, prejudiced the defendant in any way.

KUBACKI,

J.

Appendix "C"

IN THE
SUPREME COURT OF PENNSYLVANIA
Eastern District

April 17, 1979

Armando A. Pandola, Jr., Esquire
935 Lafayette Building
Philadelphia, PA 19106

Re: Commonwealth of Pennsylvania v. William J. Kelly, Appellant No. 417 January Term, 1977

Dear Mr. Pandola:

This is to advise you that the Petition for Reargument filed in the above-captioned appeal was denied by the Court on April 13, 1979.

Very truly yours,

Sally Mrvos
Prothonotary

SM/fm

Appendix "D"

IN THE
SUPREME COURT OF PENNSYLVANIA
Eastern District

COMMONWEALTH OF PENNSYLVANIA, *Appellee*	: No. 417 January Term, 1977
vs.	:
WILLIAM J. KELLY *Appellant*	:

NOTICE OF APPEAL

To the Prothonotary:

Please be notified that WILLIAM J. KELLY, Appellant, appeals the Judgment of the Honorable Court of April 13, 1979 in the above-captioned matter to the Supreme Court of the United States. This appeal is taken under 28 U.S.C. §1257(2).

DAVIDSON, AARON & TUMINI

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Filed: May 23, 1979